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No. 95-1858

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Supreme Court of the United States

October Term, 1995

DENNIS C. VACCO, Attorney General of the State of New York, GEORGE E. PATAKI, Governor of the State of New York, ROBERT M. MORGENTHAU, District Attorney of New York County,

Petitioners,

v.

TIMOTHY E. QUILL, M.D., SAMUEL C. KLAGSBRUN, M.D., and HOWARD A. GROSSMAN, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF AMICI CURIAE STATES OF CALIFORNIA, ARKANSAS, COLORADO, FLORIDA, GEORGIA, IOWA, MARYLAND, MASSACHUSETTS, MICHIGAN, MONTANA, NEBRASKA, SOUTH CAROLINA, TENNESSEE, VIRGINIA, AND WASHINGTON IN SUPPORT OF PETITIONERS DENNIS C. VACCO, ET AL.

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QUESTION PRESENTED FOR REVIEW

Whether New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

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I. INTEREST OF THE AMICI CURIAE

The case below represents a return to an era, long since past, when the principles of federalism were all but eliminated by the mistaken notion that the Fourteenth Amendment authorizes courts to substitute their judgment for that of the States in matters of economic and social welfare. In an opinion which significantly departs from this Court's present-day equal protection jurisprudence, the Second Circuit has declared that New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment to the extent that it prohibits a physician from prescribing a lethal dose of medication for self-administration by a mentally-competent, terminally ill patient in the final stages of his or her illness. *Quill v. Vacco*, 80 F.3d 716, 731 (2d Cir. 1996) (hereinafter "*Quill*"). In so holding, the Second Circuit found that New York's prohibition of assisted suicide did not further, and thus was not rationally related to, ***any*** legitimate state interest. *Quill, supra*, 80 F.3d at 729-731.

More troubling than the serious flaws in the Court's analysis is the impact of its holding. If allowed to stand, the Second Circuit's opinion will precipitate a fundamental change in the long-standing policies of a majority of States to prevent suicide and assisted suicide. "[A]ll states provide for the involuntary commitment of persons who may harm themselves as the result of mental illness, and a number of states allow the use of nondeadly force to thwart suicide attempts." *People v. Kevorkian*, 447 Mich. 436, 479, 527 N.W.2d 714, 732 (1994) (footnote omitted), *cert. denied*, 115 S.Ct. 1795 (1995). A majority of States impose criminal penalties on those who assist another to commit suicide. As Justice Scalia has observed, " . . . American law has always accorded the State the power to prevent, by force if necessary, suicide . . . " *Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261, 293 (1990) (Scalia J., concurring). However, if allowed to stand, the Second Circuit's holding will invalidate New York's prohibition of assisted suicide and, at the same time, provide authority for equal protection challenges to similar state statutes across the Nation.

The protection and preservation of human life is, without question, the quintessential duty and responsibility of the sovereign States in our federal system of government. The power of the States to fulfill this most important of responsibilities, through the exercise of the police power, is likewise unquestionable.[1] Indeed, as Justice Harlan observed in his famous dissent in *Lochner v. New York*, "[a]ll the cases agree that . . . [the States' police] power extends at least to the protection of the lives, the health, and the safety of the public against the injurious exercise by any citizen of his own rights." *Lochner v. New York*, 198 U.S. 45, 65 (1905) (Harlan, J., dissenting).

At stake in this case are, first and foremost, the lives of the people, both those who wish to die, and those who wish to live no matter what their circumstances. Also at stake is the sovereign power of the States to protect and preserve those lives *without* a federal requirement that the State " . . . make judgments about the 'quality' of life that a particular individual may enjoy, . . . " *Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261, 282 (1990). The resolution of this question will arguably affect more lives than any case which this Court will confront in the foreseeable future. It will also determine whether "the States *as States* have [any] legitimate interests which the National Government is bound to respect even though its laws are supreme." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 581 (1985) (O'Connor, J., dissenting) (italics original, citation omitted, insert added).

II. REASONS FOR GRANTING THE WRIT

The question presented in this case is whether New York's prohibition of assisted suicide violates the Equal Protection Clause of the Fourteenth Amendment. The resolution of this question will have profound implications for the continued viability of the essential role of the States in our federal system

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[1] "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people." U.S. Const. amend. X.

of government. In *San Antonio School District v. Rodriguez*, this Court cautioned that:

> "It must be remembered . . . that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny. While '[t]he maintenance of the principles of federalism is a foremost consideration in interpreting any of the pertinent constitutional provisions under which this Court examines state action,' it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 44 (1973) (footnote omitted).

Twenty-three years after this Court decided *San Antonio School District v. Rodriguez*, " . . . a case having a greater potential impact on our federal system . . . " has arrived – a case in which prohibitions of assisted suicide presently in existence in the vast majority of States are at stake.[2] *Id.*

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[2] At least forty States, Puerto Rico and the Virgin Islands, impose criminal penalties on those who assist another to commit suicide. The following states and territories have statutes which impose criminal penalties for aiding, assisting, causing, or promoting suicide: Alaska Stat., § 11.41.120(a)(2); Ariz. Rev. Stat. Ann., § 13-1103(A)(3); Ark. Stat. Ann., § 5-10-104(a)(2); Cal. Pen. Code, § 401; Colo. Rev. Stat., § 18-3-104(1)(b); Conn. Gen. Stat., § 53a-56(a)(2); Del. Code Ann., tit. 11, § 645; Fla. Stat. Ann., § 782.08; Ga. Code Ann. § 16-5-5(b); Ill. Comp. Stat. ch. 720, 5/12-31; Ind. Stat. Ann., § 35-42-1-2.5(b); Ia. Code, §§ 707A.1, 707A.2 and 707A.3, as amended by Acts of the 76th General Assembly, 1996 Session; Kan. Stat. Ann., § 21-3406; Ky. Rev. Stat., § 216:302; La. Rev. Stat., § 14:32.12; Me. Rev. Stat. Ann., tit. 17-A, § 204; Minn. Stat. Ann., § 609.215; Miss. Code Ann., § 97-3-49; Mo. Ann. Stat.,

Perhaps the best evidence of its potential impact on the Nation is the sheer number of conflicts created by the Second Circuit's opinion. In *Quill*, the Second Circuit declared that New York's statutes prohibiting assisted suicide violate the Equal Protection Clause of the Fourteenth Amendment. *Quill, supra*, 80 F.3d at 731. That holding conflicts squarely with the recent holding of the Michigan Supreme Court in *People v. Kevorkian*.[3] In addition, the rationale utilized by the Second Circuit in rendering its holding directly conflicts with numerous state court opinions. The centerpiece of the Second Circuit's opinion is unquestionably its conclusion that terminally ill persons on life support who wish to "hasten their deaths" by directing the withdrawal of such systems are similarly situated with others who wish to "hasten death by self-

§ 565.023(1)(2); Mont. Code Ann., § 45-5-105; Neb. Rev. Stat., § 28-307; N.H. Rev. Stat. Ann., § 630:4; N.J. Stat. Ann., § 2C:11-6; N.M. Stat. Ann., § 30-2-4; N.Y. Penal Law, §§ 120.30, 125.15(3); N.D. Cent. Code, § 12.1-16-04; Okla. Stat. Ann., tit. 21, §§ 813-818; 18 Pa. Cons. Stat. Ann., § 2505; P.R. Laws Ann., tit. 33, § 4009; S.D. Codified Laws Ann., § 22-16-37; Tenn. Code Ann., § 39-13-216; Tex. Penal Code Ann., § 22.08; V.I. Code Ann., tit. 14, § 2141; Wash. Rev. Code Ann., § 9A.36.060; and Wis. Stat. Ann., § 940.12. The following states have statutes which impose criminal penalties for negligent homicide which are broad enough to encompass aiding, assisting, causing or promoting suicide: Ala. Code, § 13A-6-1; and Wyo. Stat., § 6-2-107. The following states impose criminal penalties by case law for assisting a suicide: *Commonwealth v. Mink*, 123 Mass. 422, 428-429 (Mass. 1877); *People v. Kevorkian*, 447 Mich. 436, 527 N.W.2d 714 (Mich. 1994); *Blackburn v. State*, 23 Ohio St. 146, 163 (Ohio 1872); *State v. Jones*, 86 S.C. 17, 67 S.E. 160, 165 (S.C. 1910); and *State v. Willis*, 121 S.E.2d 854 (N.C. 1961).

[3] *People v. Kevorkian*, 447 Mich. 436, 480 n. 57, 527 N.W.2d 714, 732 n. 57 (1994) ("For reasons apparent in our analysis of the due process claims, we also reject the argument that Michigan's assisted suicide statute is invalid because it denies equal protection to terminally ill persons who want help in ending their lives, i.e., it denies them a right enjoyed by terminally ill persons who opt to forgo or discontinue life-sustaining medical treatment. As we explained, the two situations are not the same for purposes of constitutional analysis."), *cert. denied*, 115 S.Ct. 1795 (1995).

administering prescribed drugs."[4] *Quill, supra*, 80 F.3d at 729. However, " . . . those courts that have found a right to refuse to begin or to continue life-sustaining medical treatment have done so only after concluding that such refusal is wholly different from the act of suicide."[5] Numerous state legislatures have likewise recognized this fundamental distinction.[6] Finally, in *Cruzan v. Director, Missouri Dept. of Public Health*, 497

[4] At the threshold, it should be recognized that there is a danger in using euphemistic language such as "hastening death" when referring to the act of suicide. Such language, which is often utilized by proponents of assisted suicide, has a tendency to obfuscate the reality of the important questions which end-of-life cases generally present. *See People v. Kevorkian*, 447 Mich. 436, 464 n. 27, 527 N.W.2d 714, 725 n. 27 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Cruzan v. Harmon*, 760 S.W.2d 408, 412 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

[5] *People v. Kevorkian*, 447 Mich. 436, 480, 527 N.W.2d 714, 732 (1994) (footnote omitted), *cert. denied*, 115 S.Ct. 1795 (1995). *See, e.g., Von Holden v. Chapman*, 87 A.D.2d 66, 450 N.Y.S.2d 623, 627 (1982) ("essential dissimilarity" between right to decline medical treatment and any right to end one's life); *In re Conroy*, 98 N.J. 321, 351, 486 A.2d 1209, 1224 (1985); *Bouvia v. Superior Court*, 179 Cal.App.3d 1127, 1145, 225 Cal.Rptr. 297, 306 (1986); *Bartling v. Superior Court*, 163 Cal.App.3d 186, 196, 209 Cal.Rptr. 220, 225-226 (1984); *People v. Adams*, 216 Cal.App.3d 1431, 1440, 265 Cal.Rptr. 568, 573-574 (1990); *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1619-1623, 4 Cal.Rptr.2d 59, 61-64 (1992) and cases cited therein; *Thor v. Superior Court*, 5 Cal.4th 725, 742, 21 Cal.Rptr.2d 357, 367-368 (1993); *DeGrella v. Elston*, 858 S.W.2d 698, 706-707 (Ky. 1993). *Cf. In re Quinlan*, 70 N.J. 10, 51-52 and n. 9, 355 A.2d 647, 669-670 and n. 9 (neither attempted nor aiding suicide implicated in circumstances similar to those presented), *cert. denied*, 429 U.S. 922 (1976). *See also* Thomas J. Marzen, et al., *Suicide: A Constitutional Right?*, 24 Duq. L. Rev. 1, 10 n. 34 (1985), and cases cited therein.

[6] *See* Thomas J. Marzen, *"Out, Out Brief Candle": Constitutionally Prescribed Suicide for the Terminally Ill*, 21 Hastings Constitutional Law Quarterly, No. 3, 799, 806 n. 25 (1994) (" . . . legislatures that have codified the right to refuse treatment in the same legislation reject any affirmative act to end life."), *citing* natural death/living will statutes of forty States.

U.S. 261 (1990), this Court "assume[d] that the United States Constitution would grant a competent person a constitutionally protected right to refuse lifesaving hydration and nutrition" but, at the same time, recognized Missouri's important interest in the protection and preservation of human life, noting that "the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide." *Cruzan, supra*, 497 U.S. at 279-280 (footnote omitted). Plainly, the majority in *Cruzan* had no difficulty at all distinguishing the withdrawal of life-sustaining treatment, on the one hand, and the act of suicide, on the other.

Notwithstanding this overwhelming authority to the contrary, the Second Circuit erroneously concluded that the two situations are indistinguishable. *Quill, supra*, 80 F.3d at 729. As will be seen, the Second Circuit's failure to make this critical distinction infected its constitutional analysis, contributed to its misplaced reliance on right-to-refuse treatment cases, and led directly to its ultimate erroneous conclusion. The conflicts created by the Second Circuit's opinion, involving an issue of such exceptional and profound nationwide importance, can only be resolved – indeed, must be resolved – by the final authoritative voice of this Court.

A. Certiorari Should be Granted To Establish That A Decision by the People of a State to Prohibit Assisted Suicide Does Not Violate the Equal Protection Clause of the Fourteenth Amendment

The Equal Protection Clause of the Fourteenth Amendment provides that no State shall " . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. It is well-settled that:

> "Unless a statute provokes strict judicial scrutiny because it interferes with a fundamental right or discriminates against a suspect class, it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas v. Dickinson Public Schools*, 487 U.S. 450, 457-458 (1988) (internal quotes and citations omitted).

The Second Circuit correctly found that New York's statutes prohibiting assisted suicide neither impinge upon fundamental rights nor create suspect classifications and, accordingly, that the rational basis standard of review applied. *Quill, supra*, 80 F.3d at 726-727. However, it failed to properly apply that standard in accordance with the clear precedents of this Court. Simply put, while the Second Circuit invoked rational basis language, that was not the standard it applied.

1. The Withdrawal of Life-Sustaining Treatment Is Not the Equivalent of Suicide or Assisted Suicide, and Thus, New York's Prohibition of Assisted Suicide Does Not Create Any Class of Similarly Situated Persons

"The first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner." *In re Eric J.*, 25 Cal.3d 522, 530, 159 Cal.Rptr. 317, 320 (1979) (italics original, citation and footnote omitted). However, as a review of the challenged statutes plainly reveals, that cannot possibly be established here.

Section 125.15 of the New York Penal Law provides, in pertinent part, that "[a] person is guilty of manslaughter in the second degree when: . . . [h]e intentionally . . . aids another person to commit suicide." Violation of section 125.15 has been designated a class C felony. *Id.* Section 120.30 of the New York Penal Law provides that "[a] person is guilty of promoting a suicide attempt when he intentionally . . . aids another person to attempt suicide." Violation of section 120.30 has been designated a class E felony. *Id.*

Both statutes clearly apply to all persons and, thus, on their face, create no classifications at all. Both statutes prohibit all persons from performing specific *acts*, *i.e.*, aiding another to attempt or commit suicide.[7] Thus, to the extent that New

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[7] Neither statute has been applied in this case, *i.e.*, none of the respondents have been charged with any violation of section 125.15 or

York law classifies at all, the classification is clearly neutral. "[T]he Fourteenth Amendment guarantees equal laws, not equal results." *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 273 (1979). In *Quill*, the Second Circuit found a classification created not by the terms of the challenged statutes, or by their application in a particular case, but rather based on its conclusion that the withdrawal of life-sustaining treatment is the equivalent of the act of suicide. Thus, under the Second Circuit's reasoning, terminally ill persons who request the withdrawal of life-sustaining treatment are similarly situated with other persons who wish to commit suicide and assisted suicide. *Quill, supra*, 80 F.3d at 729. However, in addition to being contrary to the overwhelming weight of authority cited above, even the authorities cited by the Second Circuit do not support this conclusion.

The Second Circuit cited *Matter of Storar* and *Eichner v. Dillon* (decided together), 52 N.Y.2d 363, 420 N.E.2d 64, *cert. denied*, 454 U.S. 858 (1981), for the proposition that:

> "In both these cases, the New York Court of Appeals recognized the right of a competent, terminally-ill patient to hasten his death upon proper proof of his desire to do so." *Quill, supra*, 80 F.3d at 727.

Storar and *Eichner*, however, are both right to refuse treatment cases. The phrase "hasten his death" incorrectly implies that the New York Court of Appeals approved not only the right to refuse unwanted medical treatment, but also the act of suicide. It did not. Moreover, in relying on these cases, the Second Circuit ignored the far more relevant part of the majority opinion which recognized that:

> "The State has a legitimate interest in protecting the lives of its citizens. . . . It may, by statute, prohibit them from engaging in specified activities, including medical procedures which are inherently hazardous

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120.30. While a grand jury proceeding was instituted against one of the respondents, Dr. Quill, no indictment was returned. *Quill v. Koppell*, 870 F.Supp. 78, 82 (S.D.N.Y. 1994), *aff'd in part and rev'd in part sub nom. Quill v. Vacco*, 80 F.3d 716 (2d Cir. 1996).

> to their lives (*Roe v. Wade, supra*, 410 U.S. pp. 150, 154, 93 S.Ct. pp. 725, 727)." *Matter of Storar*, 52 N.Y.2d 363, 377, 420 N.E.2d 64, 71, *cert. denied*, 454 U.S. 858 (1981).

Furthermore, a review of the majority opinion reveals even more evidence that the New York Court of Appeals did not impliedly approve of suicide (*i.e.*, "hastening death"). First, the New York Court of Appeals specifically noted that the State's interest in preventing suicide was *not* implicated in the *Eichner* case. *Matter of Storar, supra*, 52 N.Y.2d at 377 n. 6. Second, recognizing the need for judicial restraint, the majority found it unnecessary to address the dissent's endorsement of a limited form of passive euthanasia. *Matter of Storar, supra*, 52 N.Y.2d at 370 n. 2. In view of the foregoing, the Second Circuit's reliance on *Storar* and *Eichner* was clearly misplaced.

The Second Circuit also relied on *Rivers v. Katz*, 67 N.Y.2d 485, 495 N.E.2d 337 (1986), for the proposition that the New York Court of Appeals had

> " . . . recognized the right to bring on death by refusing medical treatment not only as a fundamental common-law right but also as coextensive with [a] patient's liberty interest protected by the due process clause of our State Constitution." *Quill, supra*, 80 F.3d at 727 (internal quotes and citation omitted, insert original).

Again, this is incorrect. In *Rivers*, the New York Court of Appeals did not mention any "right to bring on death", a phrase which again implies approval of the act of suicide. Rather, the right which the court recognized, as evidenced from the text of the opinion itself, was *the right to refuse unwanted medical treatment*. *Rivers, supra*, 67 N.Y.2d at 493.

The Second Circuit also relied on both Article 29-B of New York Public Health Law, entitled "Orders Not to Resuscitate", sections 2960-2979, and Article 29-C, entitled "Health Care Agents and Proxies", sections 2980-2994, for the proposition that:

> " . . . the New York legislature [has] placed its imprimatur upon the right of competent citizens to hasten death by refusing medical treatment and by

> directing physicians to remove life-support systems already in place." *Quill, supra*, 80 F.3d at 727.

Again, this is incorrect. As a review of these statutes plainly reveals, the New York legislature did not recognize any right to "hasten death", rather, it recognized the right to refuse medical treatment.[8] Moreover, in relying on these statutes, the Second Circuit ignored the far more relevant statute, *i.e.*, New York Public Health Law, Article 29-C, § 2989(3), which specifically provides that:

> "This article is not intended to permit or promote suicide, assisted suicide, or euthanasia; accordingly, nothing herein shall be construed to permit an agent to consent to any act or omission to which the principal could not consent under law."

This statute directly contradicts the Second Circuit's contention that the New York legislature has either expressly or impliedly approved of suicide or assisted suicide. Plainly, it has not. In summary, none of the New York authorities discussed above support the contention that the State of New York has recognized a right to commit suicide or, as the Second Circuit phrased it, a right to "hasten death". Rather, what the State of New York has recognized is the right to refuse unwanted medical treatment, regardless of the consequences of that refusal.

The final authority relied upon by the Second Circuit in its effort to equate the withdrawal of life-sustaining treatment with the act of suicide is this Court's opinion in *Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261 (1990). However, like its reliance on New York law, that reliance is entirely misplaced. While the Second Circuit discussed several portions of the *Cruzan* opinion at length, it ignored the far more relevant portion of the opinion for present purposes, *i.e.*, the recognition by the majority that even in the face of a right to refuse medical treatment, the States may

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[8] *See, e.g.*, New York Public Health Law, Article 29-B, § 2964 (recognizing right of adult with capacity to consent to an order not to resuscitate), and Article 29-C, § 2981 (allowing for appointment of an agent "to make health care decisions on the principal's behalf").

properly assert important interests in the protection and preservation of human life, and in the prevention of both suicide and assisted suicide. *Cruzan, supra*, 497 U.S. at 280.

In *Cruzan*, this Court also discussed the underpinnings of the right to refuse medical treatment, *i.e.*: (1) the right of bodily integrity, and (2) "[t]he logical corollary of the doctrine of informed consent . . . the right not to consent, that is, to refuse treatment." *Cruzan, supra*, 497 U.S. at 269 and 270. When a terminally ill person accepts life-sustaining treatment, he or she is authorizing the invasion of bodily integrity which necessarily accompanies such treatment. The fact that such persons must sacrifice their bodily integrity in order to live plainly demonstrates they are not similarly situated with any other class. Furthermore, "[a] person may refuse life-sustaining medical treatment *because* the treatment itself is a violation of bodily integrity." *People v. Kevorkian*, 447 Mich. 436, 480 n. 59, 527 N.W.2d 714, 732 n. 59 (1994), *cert. denied*, 115 S.Ct. 1795 (1995) (emphasis added).

In sharp contrast, suicide and assisted suicide do not implicate either the right of bodily integrity or the right not to consent, *i.e.*, the right to refuse unwanted medical treatment. Simply stated, suicide and assisted suicide are so significantly different from the withdrawal or withholding of unwanted medical treatment, and its legal underpinnings, that a person exercising the right to refuse such treatment cannot be considered similarly situated with a person seeking to commit suicide or assisted suicide. The two situations simply are not the same for constitutional purposes. "The Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same." *Tigner v. Texas*, 310 U.S. 141, 147 (1940).

2. New York's Prohibition of Assisted Suicide Is Rationally Related to Numerous Important Governmental Objectives

Review under the rational basis standard " . . . is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas v. Stanglin*, 490 U.S. 19, 26 (1989).

In discussing the rational basis standard in *McGowan v. Maryland*, the Court stated that:

> "Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." *McGowan v. Maryland*, 366 U.S. 420, 425-426 (1961). See also *Dandridge v. Williams*, 397 U.S. 471, 485 (1970).

As Justice Stewart observed in his concurring opinion in *San Antonio School District v. Rodriguez*, 411 U.S. 1, 60 (1973), "[t]his doctrine is no more than a specific application of one of the first principles of constitutional adjudication – the basic presumption of constitutional validity of a duly enacted state or federal law. [citation omitted]" Thus, under the rational basis standard, legislation is first presumed valid and then, shielded by that presumption, tested to determine if the classification it creates is rationally related to a legitimate state interest.[9]

In discussing this presumption in *Quill*, however, the Second Circuit stated "[t]he general rule . . . is that state legislation carries a presumption of validity **if** the statutory classification is 'rationally related to a legitimate state interest.' [citation omitted]" *Quill, supra*, 80 F.3d at 725 (emphasis added). This is incorrect. The existence of the presumption of validity is not conditioned upon a subsequent finding of rational relationship; rather, the presumption *precedes* application

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[9] *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) ("The general rule is that legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest. [citations omitted]").

of the standard itself. The Second Circuit's apparent failure to accord New York's statutes the presumption of validity to which they are entitled may provide at least some explanation why the Court utilized such a strict, skeptical, means-end analysis to review the challenged statutes.

While the Second Circuit did identify several important state interests implicated by New York's prohibition of assisted suicide, it went on to conclude that:

> "The New York statutes prohibiting assisted suicide, which are similar to the Washington statute, do not serve any of the state interests noted, *in view of the statutory and common law schemes allowing suicide through the withdrawal of life-sustaining treatment.*" *Quill, supra*, 80 F.3d at 730 (italics added).

This holding, like its misidentification of a similarly situated class, is based on the Second Circuit's failure to differentiate between the withdrawal of life-sustaining treatment and the act of suicide. Once this recurrent error is removed from the analysis, however, it immediately becomes clear that New York's prohibition of assisted suicide directly furthers, and thus is rationally related to, several important state interests. Those interests include, but are not limited to: (1) the protection and preservation of human life;[10] (2) the prevention of suicide;[11] (3) preventing the fraud, errors and abuse which would

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[10] *Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261, 280 (1990).

[11] "Suicide is the eighth leading cause of death in the United States." New York State Task Force Report, *When Death is Sought – Assisted Suicide and Euthanasia in the Medical Context* (May 1994), at 9 (footnote omitted). "Studies that examine the psychological background of individuals who kill themselves show that 95 percent have a diagnosable mental disorder at the time of death." *Id.*, at 11. Furthermore, "[l]ike other suicidal individuals, patients who desire suicide or an early death during a terminal illness are usually suffering from a treatable mental illness, most commonly depression." *Id.*, at 13 (footnote omitted).

accompany acceptance of suicide and assisted suicide;[12] (4) maintaining the ethical integrity of the medical profession;[13] (5) protecting the poor and minorities from exploitation;[14] (6) protecting handicapped persons from societal indifference;[15] and (7) protecting innocent third parties.[16]

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[12] *Cruzan, supra*, 497 U.S. at 281 ("[E]ven where family members are present, [t]here will, of course, be some unfortunate situations in which family members will not act to protect a patient. A State is entitled to guard against potential abuses in such situations. [citation omitted, internal quotes omitted]"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr. 59, 64 (1992) ("The state's interest must prevail over the individual because of the difficulty, if not the impossibility, of evaluating the motives of the assister or determining the presence of undue influence."), and *Donaldson, supra*, 2 Cal.App.4th at 1624 ("Third parties, even family members, do not always act to protect the person whose life will end.").

[13] *Cf. Middlesex Ethics Committee v. Garden State Bar Association*, 457 U.S. 423, 434 (1982) (important state interest in "maintaining and assuring the professional conduct of professional attorneys it licenses"). *See also Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1620, 4 Cal.Rptr.2d 59, 62 (1992) (recognizing state interest in maintaining the ethical integrity of the medical profession). In reaffirming its long-standing opposition to physician assisted suicide, the American Medical Association has declared that physician-assisted suicide " . . . threatens the very core of the medical profession's ethical integrity" and is " . . . fundamentally inconsistent with the physician's professional role." American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2 (July 1994), Report 59, *Physician-Assisted Suicide*, 269 and 274, respectively.

[14] *Quill, supra*, 80 F.3d at 730, *citing Compassion in Dying v. State of Washington*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[15] *Quill, supra*, 80 F.3d at 730, *citing Compassion in Dying v. State of Washington*, 49 F.3d 586, 592-593 (9th Cir. 1995), *superseded by* 79 F.3d 790 (9th Cir. 1996).

[16] *Application of President & Directors of Georgetown College, Inc.*, 118 U.S.App.D.C. 80, 331 F.2d 1000, 1008 (1964), *cert. denied*, 377 U.S. 978 (1964). *See also Bartling v. Superior Court*, 163 Cal.App.3d 186, 195 n. 6, 209 Cal.Rptr. 220, 225 n. 6 (1984).

The Second Circuit's application of the rational basis standard was further flawed by its improper insertion of quality-of-life considerations into its analysis which it used to discount the State's important interest in the protection and preservation of human life. *Quill, supra*, 80 F.3d at 729-730. Such quality-of-life considerations are directly contrary to this Court's holding in *Cruzan* that:

> "[W]e think a State may properly decline to make judgments about the 'quality' of life that a particular individual may enjoy, and simply assert an unqualified interest in the preservation of human life to be weighed against the constitutionally protected interests of the individual." *Cruzan v. Director, Missouri Dept. of Public Health*, 497 U.S. 261, 282 (1990).

The dangers inherent in using such quality-of-life considerations are well-recognized. "Were quality of life at issue, persons with all manner of handicaps might find the state seeking to terminate their lives." *Cruzan v. Harmon*, 760 S.W.2d 408, 420 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990). Such an analysis also disregards the irrefutable principle that all lives, from beginning to end and irrespective of physical or mental condition, are under the full protection of the law.

> "The life of those to whom life has become a burden – of those who are hopelessly diseased or fatally wounded – nay, even the lives of criminals condemned to death, are under the protection of the law, equally as the lives of those who are in the full tide of life's enjoyment, and anxious to continue to live." *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 295 (1990) (Scalia, J., concurring), *citing Blackburn v. State*, 23 Ohio St. 146, 163 (1873).

In discounting the State's important interest in the protection and preservation of human life, the Second Circuit also cited this Court's opinion in *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). That citation was particularly surprising in that *Casey* itself reaffirms the States' " . . .

legitimate interests from the outset of the pregnancy in protecting the health of the woman and the life of the fetus that may become a child." *Casey, supra*, 505 U.S. at 846. Nevertheless, the Second Circuit relied on *Casey* when posing the following rhetorical question:

> "What concern prompts the state to interfere with a mentally competent patient's 'right to define [his] own concept of existence, of meaning, of the universe, and of the mystery of human life,' *Planned Parenthood v. Casey*, 505 U.S. 833, 851, 112 S.Ct. 2791, 2807, 120 L.Ed.2d 674 (1992), when the patient seeks to have drugs prescribed to end life during the final stages of a terminal illness? The greatly reduced interest of the state is preserving life compels the answer to these questions: 'None.' " *Quill, supra*, 80 F.3d at 730.

There are at least two fundamental flaws in the Second Circuit's reliance on *Casey* for this proposition. First, it is well-settled that "[i]t is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 33 (1973). That, however, was precisely what the Second Circuit did in this case. Within the liberty interest described by this Court in *Casey*, the Second Circuit has created a new right "to have drugs prescribed to end life during the final stages of a terminal illness". *Quill, supra*, 80 F.3d at 730. Second, this is precisely the sort of "unlimited right to do with one's body as one pleases" which this Court has consistently and soundly rejected. *See Roe v. Wade*, 410 U.S. 113, 154 (1973); *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986); and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 68 (1973), *citing, inter alia*, constitutionally unchallenged laws against suicide.

Finally, in *Quill*, the Second Circuit suggested that New York could achieve its objective of avoiding undue influence on the elderly and infirm to choose death by " . . . establish[ing] rules and procedures to assure that all choices [to commit assisted suicide] are free of such pressures." *Quill, supra*, 80 F.3d at 730 (inserts added). With respect to the definition of "terminal illness", the Second Circuit suggested:

> "Again, New York may define that stage of illness with greater particularity, require the opinion of more than one physician or impose any other obligation upon patients and physicians who collaborate in hastening death. [footnote omitted]" *Quill, supra*, 80 F.3d at 731.

In the footnote which accompanies the quoted text, the Second Circuit went on to suggest numerous other ways in which the State of New York could achieve its objectives but still allow assisted suicide. *Quill, supra*, 80 F.3d at 731 n. 4. However, this same argument was rejected by the Court in *Dallas v. Stanglin*, 490 U.S. 19 (1989), and, as in that case, demonstrates a " . . . missapprehen[sion] of the nature of rational-basis scrutiny, which is the most relaxed and tolerant form of judicial scrutiny under the Equal Protection Clause." *Dallas, supra*, 490 U.S. at 26-27. The fact that a State may, if it chooses, seek to achieve its legitimate objectives through other means does not, in any way, establish that the means actually selected are either irrational or arbitrary. Indeed, as this Court observed with respect to the problems of financing and managing a statewide public school system:

> "The very complexity of the problems . . . suggests that there will be more than one constitutionally permissible method of solving them, and that, within the limits of rationality, the legislature's efforts to tackle the problems should be entitled to respect." *San Antonio School District v. Rodriguez*, 411 U.S. 1, 42 (1973) (internal quotes and citation omitted).

B. Certiorari Should be Granted to Reaffirm the Essential Role of the States in our Federal System and the Power of the People to Directly Govern Their Own Affairs

With the ever-increasing power of medical science to prolong life, even in the face of what would otherwise be terminal illness, the States have had to strike a balance between the rights of the individual and the demands of

organized society. That balance is grounded in the States' recognition of their responsibility to protect both individual rights and, at the same time, the lives of those who wish to live no matter what their circumstances. In striking that balance, the States have drawn a line between an individual's "right to be let alone",[17] on the one hand, and intentionally killing oneself, with or without assistance, on the other. That balance, now a national consensus, is represented by statutes in a majority of states which both codify an individual's right to refuse unwanted medical treatment and, in the same legislation, reject any affirmative act to end life. The exercise of the right to refuse life-sustaining medical treatment permits an individual to determine, at least to some extent, when he or she will die. The exercise of this right does not, however, condemn such an individual to suffer either an undignified death or excruciating pain. Rather, at the same time an individual elects to forego life-sustaining treatment, he or she may choose to accept palliative care which will help insure both a dignified death and well-controlled symptoms.[18]

Whether this balance should be abandoned and the line redrawn to permit an individual to commit suicide without state interference, and then redrawn yet again to permit assisted suicide, is a matter appropriately left for the people to decide, through their duly elected representatives or by

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[17] *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting), *overruled by Katz v. United States*, 389 U.S. 347, 352-353 (1967).

[18] Palliative care is designed to relieve distressing symptoms in dying patients and includes measures to alleviate pain and suffering, together with the provision of emotional, social and spiritual support for the patient. The Hastings Center, *Guidelines on the Termination of Life-Sustaining Treatment and the Care of the Dying*, 71-73 (1987). *See also*, American Medical Association, Council on Ethical and Judicial Affairs, *Code of Medical Ethics Reports*, Vol. V, No. 2 (July 1994), Report 59, *Physician-Assisted Suicide*, 269, 272-273 (describing advances in hospice care).

initiative ballot.[19] The principles of federalism embodied in our Constitution require no less. Simply put, as Justice Scalia noted in the right to refuse treatment context, " . . . the federal courts have no business in this field . . . " *Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261, 293 (1990) (Scalia, J., concurring). In addition, as the Missouri Supreme Court has observed, the courts are simply not an appropriate forum for resolution of broad questions of public policy.

> "Broad policy questions bearing on life and death issues are more properly addressed by representative assemblies. These have vast fact and opinion gathering and synthesizing powers unavailable to courts; the exercise of these powers is particularly appropriate where issues invoke the concerns of medicine, ethics, morality, philosophy, theology and law. Assuming change is appropriate, this issue demands a comprehensive resolution which courts cannot provide." *Cruzan v. Harmon*, 760 S.W.2d 408, 426 (Mo. banc 1988), *aff'd sub nom. Cruzan v. Director, Missouri Dept. of Health*, 497 U.S. 261 (1990).

As the States continue to grapple with the difficult questions presented by the ever-increasing ability of medical technology to prolong life, the corresponding need to allow the States to serve as laboratories for change becomes paramount. Indeed, as this Court has recognized, "[t]he science of government . . . is the science of experiment, . . . " *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985) (citation and internal quotes omitted).

> "To stay experimentation in things social and economic is a grave responsibility. Denial of the right to experiment may be fraught with serious consequences to the Nation. It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic

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[19] *See People v. Kevorkian*, 447 Mich. 436, 481-482, 527 N.W.2d 714, 733 (1994), *cert. denied*, 115 S.Ct. 1795 (1995), and *Donaldson v. Lungren*, 2 Cal.App.4th 1614, 1623, 4 Cal.Rptr.2d 59, 64 (1992).

> experiments without risk to the rest of the country. . . . " *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

If allowed to stand, the Second Circuit's opinion in *Quill* will effectively extinguish the power of the States to continue to serve as laboratories for change on an issue that arguably will affect more lives than any other issue the States will face in the foreseeable future. If allowed to stand, it will also " . . . invite[] an unelected federal judiciary to make decisions about which state policies it favors and which ones it dislikes." *Garcia v. San Antonio Metro.*, 469 U.S. 528, 546 (1985). At the same time, it will " . . . relegate the States to precisely the trivial role that opponents of the Constitution feared they would occupy." *Garcia, supra*, 469 U.S. at 575 (Powell, J., dissenting) (footnote omitted).

> "The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary." *Compassion in Dying v. State of Washington*, 79 F.3d 790, 858 (9th Cir. 1996) (Kleinfeld, C.J., dissenting).

III. CONCLUSION

For all the foregoing reasons, amici States respectfully request that the Court grant certiorari in this case.

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